Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-280

MARLENE J. SWIMLEY,

Petitioner,

vs.

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, FIRST DISTRICT

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TABLE OF CONTENTS

	PAGE
Opinions Below	1
Jurisdiction	2
Question Presented	2
Constitutional Provision Involved	2
Statement	3
Reasons For Granting The Writ	8
Conclusion	13
Appendices:	
A—Opinion of the Appellate Court of Illinois, First District (January 12, 1978)	1a
B—Order of the Illinois Supreme Court Denying Leave to Appeal (May 26, 1978)	22a

LIST OF AUTHORITIES CITED

Constitutional Provisions

Fourteenth Amendment to the Constitution of the United States	2, 8

Cases

Cool v. United States, 409 U.S. 100 (1972)	9
Lakeside v. Oregon, ... U.S. ....., 55 L.Ed.2d 319 (1978)	12, 13
Querica v. United States, 289 U.S. 466 (1933)	12

Taylor v. Kentucky, ... U.S. ....., 56 L.Ed.2d 468 (1978) 8, 13

United States v. Leonard, 494 F.2d 955 (D.C. Cir. 1974) 10, 13

United States v. United States Gypsum Co., ... U.S. ..... (1978), 23 Cr.L. 3199 13

United States v. Wasko, 473 F.2d 1282 (7th Cir. 1973) 11, 13

Washington v. Texas, 388 U.S. 14 (1967) 8

Other Authorities

Devitt & Blackmar, Federal Jury Practice and Instructions, secs. 12.02, 12.04 9

Illinois Pattern Jury Instructions-Criminal, sec. 3.17 .. 9

La Buy, Jury Instructions in Federal Criminal Cases, sec. 6.08 9

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OPINION BELOW

Petitioner, Marlene J. Swimley, respectfully prays that a writ of certiorari issue to review the judgment of the Appellate Court of Illinois, First District, affirming the judgment of the Circuit Court of Cook County. The judgment of the Circuit Court of Cook County is not reported. The opinion of the Appellate Court is reported at 57 Ill. App. 3d 116, 372 N.E.2d 887 (1978). The opinion of the Appellate Court is included as Appendix "A" to this petition. The order of the Supreme Court of Illinois, denying the petition for leave to appeal without opinion, is not officially reported. A copy of the order of the Supreme Court of Illinois is attached as Appendix "B" to this petition.

JURISDICTION

The judgment of the Illinois Appellate Court was entered on January 12, 1978. Petition For Leave to Appeal to the Illinois Supreme Court was denied on May 26, 1978. The jurisdiction of the Court is invoked under and pursuant to 28 U.S.C., Sec. 1257(3).

QUESTION PRESENTED

Whether petitioner was denied a fair trial by the trial court's refusal to give requested cautionary instructions on the testimony of accomplices and immunized witnesses when two of the principal witnesses against petitioner were alleged accomplices and one of the witnesses had received immunity from prosecution, and the other had received financial aid.

CONSTITUTIONAL PROVISION INVOLVED

Fourteenth Amendment to the Constitution of the United States:

> ". . . nor shall any State deprive any person of life, liberty, or property, without due process of law . . ."

STATEMENT

Petitioner was charged with solicitation to commit murder by attempting to hire an undercover investigator to murder her husband, Duane Swimley, in violation of Ill. Rev. Stat. 1973, Ch. 38, paragraph 8-1.

In November of 1973, petitioner lived with her husband, one child, and two of petitioner's children by a previous marriage, in Schaumburg, Illinois.

At trial a neighbor boy, Kevin Senne, age 15, who had been given immunity from prosecution in exchange for his testimony against petitioner, testified that early in November of 1973, one of petitioner's sons, Joseph Enderle, age 13, told him that he and petitioner wanted to kill petitioner's husband and asked whether Kevin knew anyone who could do it. (A. 66-76)

Kevin Senne testified to a series of conversations with petitioner and her son, Joe Enderle, in which they discussed possible ways of murdering her husband. (A. 66-69) The State argued in the trial court that the conversations of Senne and DeSpain were admissible under a co-conspirator or joint venture theory, which was accepted by the trial court and which would of course make them accomplices. Kevin Senne testified that he called another friend in California, John DeSpain, age 15, formerly of Schaumburg, in an effort to get in touch with a man named Tom Mangione, the boyfriend of DeSpain's sister. (A. 66-67) Tom Mangione, who was living in Rochester at the time, testified that when Kevin did reach him by telephone, he asked if Mangione knew a hit man who would commit a murder and Mangione told him it must be some kind of joke and hung up. (A. 52)

Thereafter Kevin Senne claimed to have had several conversations with John DeSpain in California and at one point John agreed to do the job. (A. 69-70) Kevin also claimed that petitioner arranged for John DeSpain to fly to Chicago from California. Both Kevin Senne, who had received immunity, and John DeSpain himself testified to these arrangements. (A. 69-71; 61-62) John DeSpain claimed that he walked 15 miles to the airport. DeSpain also testified that after the arrrangements were made, he got scared and decided not to come to Chicago and, although he had no money, went home in a taxi. (A. 63, 65) DeSpain, who denied that he had received immunity or a promise of leniency but who was not being prosecuted, testified that at the time of trial he had run away from a foster home in the Chicago area and was living in California, and had been flown back and forth to visit at the expense of the State. (A. 63-64) He also admitted that the State's Attorney's office had been sending $25 per week for four weeks to a woman with whom he lived in California. (A. 63)

Meanwhile, Rock DeSpain, the father of John, while visiting his daughter, Christie, learned of the phone call from Kevin Senne to Tom Mangione. Rock DeSpain, who knew Kevin Senne to be a friend of his son John, thought it was serious and asked Tom to find out more about it. Tom then called Kevin, told him he could go ahead with it and asked who he wanted killed. Kevin told him he wanted his friend's mother's husband killed and Tom told him to wait for a call from a man named Jimmy Sunshine. (A. 53-54)

Tom Mangione then called Rock DeSpain and told him of the conversation with Kevin. Thinking that he might be the intended victim, Rock DeSpain contacted the local police on December 13. Early in January of

1974 while Tom Mangione and Christie DeSpain were in town for the holidays, they also met with the Schaumburg police. (A. 55-56)

Meanwhile, Kevin Senne testified that he told Joe Enderle and petitioner about the conversation with Tom Mangione, and that they waited for the call from Jimmy Sunshine. (A. 72)

On January 23, 1974, Officer McGraw of the Schaumburg police department went to the office of the State's Attorney of Cook County. Joseph Saladino, a State's Attorney's Investigator, called the phone number of the Senne family several times, but got no answer. (A. 58, 77)

At the suggestion of Officer McGraw, Saladino then called the number registered to petitioner's husband, Duane Swimley. A male voice answered and Saladino told him he was Jimmy Sunshine. During the conversation, Saladino arranged to meet the person's mother on the following day in a shopping center parking lot. (A. 58, 77) Kevin Senne testified at trial that Joe Enderle told him of the call from Jimmy Sunshine. (A. 72)

On January 24, Saladino, equipped with a concealed tape recorder and radio transmitter, went to the shopping center parking lot. When petitioner arrived in her car, Saladino entered the passenger side and said, "I understand you wanted to see me." (A. 79) According to Saladino, during the conversation petitioner said she wanted her husband "evaporated" and "gone". When Saladino asked, "Do you mean murder?", petitioner said, "Yeah". (A. 18-19, 79) They then discussed where it would be done and agreed that it would be best to do it in Germany, where petitioner's husband was currently on active duty with the U.S. Air Force Reserve. (A. 79-81) After Saladino took $100 from petitioner as a down-

payment, with the agreement that she give him another $400 on the following day, petitioner was arrested. (A. 81)

At trial petitioner denied plotting to murder her husband and denied that she had conversations about a murder plot with Kevin Senne. (A. 94) Petitioner testified that the first time she heard of the incident was on the evening of January 23, when Kevin told her he had arranged for someone to murder her husband. Petitioner replied that this was ridiculous and asked why he would do something like that. Kevin asked, "Well, aren't you tired of getting beaten up all of the time?" and petitioner replied that Sam (her husband) was her problem and they would work it out by themselves. (A. 87-89)

Petitioner testified that she agreed to meet Saladino after Kevin started to cry and said he was afraid that the man would do something to him if she did not meet him. (A. 88-89) Petitioner testified that she decided to meet Saladino for the purpose of discouraging him and explained that she gave him a ten-year old photograph of her husband in a military uniform, which she thought would discourage him. She insisted on several days notice and asked that it be done in Germany because she knew it was impossible to get him off the base. (A. 89)

Since the State's case was based in part on the testimony of Kevin Senne and John DeSpain, who claimed to have participated in the plot to murder petitioner's husband, petitioner requested that the jury be given an instruction on accomplice testimony. The requested instruction, which was refused was as follows:

> An accomplice is one who unites with another person in the commission of a crime, voluntarily and with common intent. An accomplice does not become incompetent as a witness because of participation in the crime charged. On the contrary, the testimony of an accomplice alone, if believed by the jury, may be of sufficient weight to sustain a verdict of guilty, even though not corroborated or supported by other evidence. However, the jury should keep in mind that such testimony is always to be received with caution and weighed with great care. (A. 15)

Since Kevin Senne had received immunity from prosecution, and admitted that he would not be testifying if he had been granted immunity, and John DeSpain admitted that he had received financial aid from the State, petitioner also requested that the Court give the following instruction on the testimony of an immunized witness:

> The testimony of an informer who provides evidence against a defendant for pay, or for immunity from punishment, or for personal advantage or vindication, must be examined and weighed by the jury with greater care than the testimony of an ordinary witness. The jury must determine whether the informer's testimony has been affected by interest, or by prejudice against defendant. (A. 16)

The jury returned a verdict of guilty and petitioner was sentenced to 3 to 9 years in the Illinois State Penitentiary.

The conviction was affirmed by the Appellate Court of Illinois, First District. 57 Ill. App. 3d 116, 372 N.E.2d 887 (First Dist. 1978). A petition for leave to appeal to the Supreme Court of Illinois was denied.

REASONS FOR GRANTING THE WRIT

PETITIONER WAS DENIED A FAIR TRIAL BY THE TRIAL COURT'S REFUSAL TO GIVE REQUESTED CAUTIONARY INSTRUCTIONS ON THE TESTIMONY OF ACCOMPLICES AND IMMUNIZED WITNESSES.

Petitioner asks that certiorari be granted because she was denied a fair trial and Due Process of Law when the trial Court refused to give either of her tendered instructions on accomplice testimony or the testimony of an immunized witness and left the jury to be guided only by the general credibility instructions. We contend that where, as here, a substantial portion of the State's case is predicated upon the testimony of an accomplice who would not be testifying but for a grant of immunity from prosecution, Due Process commands that the jury be instructed that the testimony of such witness be scrutinized with greater caution than that exercised in consideration of the testimony of ordinary witnesses. This Court has, of course, held that the jury instructions given in State criminal trials are subject to the fair trial requirement of the due process clause of the Fourteenth Amendment. *Taylor v. Kentucky*, ... U.S. ....., 56 L.Ed.2d 468 (1978).

The law is well-settled that the testimony of an accomplice is to be viewed with suspicion and scrutinized with great care. This Court, for example, recognized in *On Lee v. United States*, 343 U.S. 747, 757 (1952) that accomplice testimony raises serious questions of credibility and that a defendant "is entitled . . . to have the issues submitted to the jury with careful instructions." In *Washington v. Texas*, 388 U.S. 14 (1967), this Court observed that common sense would suggest that an alleged

accomplice has a great interest in lying in favor of the prosecution. And in *Cool v. United States*, 409 U.S. 100 (1972), this Court stated that "Accomplice instructions have long been in use and have been repeatedly approved." (409 U.S. at 103) Extra scrutiny and caution is, of course, even more appropriate when the accomplice-witness has received immunity from prosecution in exchange for his testimony.

These principles are so well established that they have been included on the manuals on jury instructions currently used in the federal courts. See, for example, Devitt & Blackmar, *Federal Jury Practice and Instructions*, sec. 12.02, 12.04; La Buy, *Jury Instructions In Federal Criminal Cases*, sec. 6.08.

It is equally well-established in Illinois that ". . . the testimony of an accomplice is liable to grave suspicion and should always be acted upon with great care and caution." (*People v. Borella*, 362 Ill. 218, 223). As in the federal practice manuals on jury instruction, the Illinois courts have a pattern jury instruction which embodies this rule of law. *Illinois Pattern Jury Instructions-Criminal*, sec. 3.17, and Illinois Supreme Court Rule 451 requires the use of Illinois pattern jury instructions in the Illinois trial courts. Unlike the federal practice manuals, however, there is no standard Illinois instruction on the testimony of an immunized witness.

In this case petitioner submitted both an accomplice instruction and an instruction on the testimony of an immunized witness. Although the accomplice instruction was taken from the Devitt and Blackmar volume, rather than from the Illinois pattern jury instructions, the thrust of the two instructions was the same; namely, that the testimony of an accomplice should be received with caution. The instruction on the testimony of an im-

munized witness was also patterned after the Devitt and Blackmar volume.

The trial court refused to give either instruction and the Appellate Court of Illinois, First District, affirmed petitioner's conviction. In affirming, the Appellate Court held that there was no error because the general instructions on credibility of witnesses and prior inconsistent statements provided the jury with sufficient direction, (372 N.E.2d 887, 57 Ill. App.3d 116) (Appendix, p. 20a)

Directly contrary to the decision below in the holding of the Court of Appeals for the District of Columbia Circuit in *United States v. Leonard*, 494 F.2d 955 (D.C. Cir. 1974). Although the lower court here held that refusal of the accomplice instruction was not error, the Court of Appeals in *Leonard* observed that:

> "We have no doubt that it is better practice for a district court sua sponte to caution the jury concerning an accomplice's testimony, and that it is reversible error to refuse to give a requested accomplice instruction." (494 F.2d at 960)

The *Leonard* case is particularly appropriate for comparison with petitioner's case because there, as here, defendant requested both an accomplice instruction and an instruction on the testimony of two immunized witnesses. In reversing, the Court of Appeals in *Leonard* said:

> Like the paid informer who has a pecuniary interest in testifying, or an accomplice who has a penal interest in shifting guilt to his cohort, a witness who has been granted immunity has an interest in incriminating another to save himself. *Cf. McMillen, supra.* Typically, as in this case, the government offers immunity to a lesser or minor coconspirator, or accomplice, who stands in jeopardy of being convicted, as an incentive to testify against others more significantly involved. A potential witness, so confronted, realizes that he can procure his own freedom by incriminating another, and therein lies his motivation to falsify. We hold, therefore, that the district court committed reversible error in refusing to instruct the jury when requested, to consider with caution the testimony of Jones and Hughes, important government witnesses who had been granted immunity from prosecution. (494 F.2d at 961) (footnote omitted)

In remanding the case for a new trial, the Court of Appeals recommended that "the district court should merge both requests into a single instruction that the testimony of Jones and Hughes is to be scrutinized with caution because they are accomplices and because they have been granted immunity." (494 F.2d at 962) Petitioner contends that the trial court in her case should have done the same and that to refuse both instructions, without offering any alternative or substitute, amounted to a denial of due process of law.

Further supporting our contention is *United States v. Wasko*, 473 F.2d 1282 (7th Cir. 1973) where the Seventh Circuit held that "defendant was entitled to the [accomplice] instruction, or an appropriate substitute, and its omission under the circumstances requires reversal." (473 F.2d at 1284)

Although the Appellate Court did not expressly say so, it seems to have placed some reliance upon the fact that petitioner did not submit the standard Illinois pattern jury instruction on accomplice testimony and on the fact "that Supreme Court Rule 451 (Ill. Rev. Stat. 1973, Ch. 110A, par. 451) does not require the trial court to give a non-IPI instruction" (Appendix, p. 19a). This view is inconsistent with this Court's repeated recognition of the fact that a trial judge is not the "mere moderator, but is the governor of the trial for the purpose of assuring its

proper conduct and of determining questions of law". (*Quercia v. United States*, 289 U.S. 466, 469 (1933), quoted in *Lakeside v. Oregon*, ... U.S. ....., 55 L.Ed.2d 319, 327). Where, as here, the jury instruction submitted is not precisely in the language of the standard instructions in use in the jurisdiction, it is the duty of the court to give the proper instruction or fashion an appropriate alternative which conveys the substance of the requested instruction to the jury. The courts have repeatedly affirmed convictions where the trial court did not instruct the jury exactly as requested by the defense counsel, but where "the substance" of the request was included in another instruction. This implies and assumes not only the power, but the duty, of the trial court to assure a fair trial by seeing that the jury is properly instructed.

Failure to give either instruction was particularly damaging to petitioner. The instructions were particularly appropriate here where both Kevin Senne and John DeSpain were considered accomplices by the State, where the State admitted that Kevin Senne was given immunity and where Kevin Senne himself admitted that he would not be testifying if he had not received immunity from prosecution. Under the circumstances, failure of the trial court to give the requested cautionary instructions was error. Although it is true, as the Appellate Court observed, that the actual solicitation in the parking lot was testified to by Saladino alone, a major portion of the trial was indeed devoted to the background events testified to by the alleged accomplices Kevin Senne and John DeSpain. Their testimony was crucial to what the Appellate Court recognized as the central issue—i.e., petitioner's "meaning and intent during this conversation" in the parking lot with Saladino. (Appendix, p. 20a) The obvious purpose of calling Senne and DeSpain as witnesses at trial was to introduce evidence bearing on petitioner's alleged intent. When the

case is correctly viewed from this prospective, it becomes apparent that failure of the trial court to give any cautionary instruction on the testimony of Senne and DeSpain was highly prejudicial, and amounted to a denial of due process of law. As in the recent case of *United States v. United States Gypsum Co.*, ... U.S. ..... (1978), the general credibility instructions were "unnecessarily confining". (23 Cr.L. at 3211)

For the foregoing reasons certiorari is appropriate in this case. Last term this Court granted certiorari because of conflicting decisions on cautionary jury instructions among several jurisdictions. (See *Lakeside v. Oregon*, ... U.S. ....., 55 L.Ed.2d at 323) Certiorari was also granted to review the jury instructions given in another State criminal case. *Taylor v. Kentucky*, ... U.S. ....., 56 L.Ed.2d 468 (1978) The contrast between the decision of the Appellate Court of Illinois below and the decisions of the Court of Appeals in the *Leonard* and *Wasko* cases indicates that certiorari is also appropriate here.

CONCLUSION

For the reasons stated above, it is respectfully requested that the Petition for Writ of Certiorari to the Appellate Court of Illinois, First District, be granted.

Respectfully submitted,

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APPENDIX A

Opinion of the Appellate Court of Illinois

MR. JUSTICE LINN delivered the opinion of the court:

Defendant, Marlene Swimley, was charged by indictment with the offense of solicitation to commit murder. (Ill. Rev. Stat. 1973, ch. 38, par. 8-1.) Specifically, defendant was accused of attempting to contract for the murder of her husband. Following a trial by jury, a verdict of guilty was returned. Defendant was sentenced to the penitentiary for a term of three to nine years.

The pertinent facts of this case, as set out at trial, need to be stated at some length:

In early November of 1973, in Schaumburg, Illinois, defendant's son by a prior marriage, Joe Enderle, age 13, visited a neighbor, Kevin Senne, age 15. Kevin was told that Joe and his mother were going to attempt to kill defendant's husband, Duane Swimley, and was asked whether he knew anyone who would do it. Both boys went to the Swimley home and, in defendant's presence, Kevin told defendant that he thought Tom Mangione could accomplish the task. Kevin had heard about Mangione from a 13 year old neighbor and friend, John DeSpain, who was also known as John Heying. John had recently left Schaumburg and moved to California to reside with his uncle.

On November 22, Kevin spoke by telephone to John DeSpain in California and asked him for Mangione's telephone number, stating that defendant wanted her husband killed. John did not know Mangione's number, but told

Kevin to call his younger sister, Kathy DeSpain, who might know the number.

Upon calling Kathy the next day, Kevin was told that Mangione now lived in Rochester, New York, but that she didn't know his phone number. Kevin again called John DeSpain and was told that there was no possibility that John could obtain the number.

Defendant, with Kevin and her son present, telephoned the long distance information operator in Rochester, New York, but was informed that Tom Mangione had an unlisted number. A short time later, defendant again called the Rochester operator, stating that there was a death in the family and that the operator should contact Mangione to inform him that he should telephone Kevin, giving the phone number at the Swimley home.

On December 1, 1973, after receiving the message, Mangione called the number and asked for Kevin Senne. Mangione, after some conversation, on being asked if he knew someone who would commit a murder, said that this "must be some kind of a joke," and hung up. After this conversation, Kevin, Joe and defendant discussed the possibility of finding someone else to kill defendant's husband.

Subsequently, Kevin and John DeSpain, who was still in California, had another telephone conversation during which John stated that he might consider murdering Duane Swimley. On December 7, there was a flurry of phone calls between John and Kevin. John asked whether defendant could fly him and his cousin back to Chicago if he would commit the murder. He explained that he had an argument with his uncle and had run away and no longer

wanted to stay in California. Kevin replied that he would try to speak with defendant, and arranged to call John back. That evening, Kevin related his conversation with John to defendant, who replied that she would try to get the airline tickets for the trip to Chicago for John and his cousin. Kevin called John back from the Swimley home, telling him that defendant would try to get the money for the tickets. John then took a bus to Sacramento, California and, being without money for transportation, walked about 15 miles to the Sacramento airport where he hoped to pick up the tickets paid for by defendant. He called Kevin who told him to stay at the airport until arrangements were completed to make the tickets available.

After telephoning various airlines, reservations for two tickets were made under the name of M. Brown on United Airlines for Master B. Enderle and Master J. Enderle on a flight from Sacramento to Chicago. The tickets, which were to be picked up at the Sacramento airport, cost $269.25. This amount had been prepaid in cash. A call was made to John and defendant told him the tickets could be picked up at the airport the following day.

After this telephone conversation, John became frightened. He telephoned his grandfather and returned to his grandfather's home without informing Kevin or defendant. After a period of time, defendant became agitated that John hadn't arrived and referred to a previous time that a man she had hired to kill her husband had absconded with $1200.00.

Meanwhile, on the following day, December 8, 1973, Rock DeSpain, John's stepfather, visited Tom Mangione in

Rochester. Mangione was the boyfriend of DeSpain's daughter. DeSpain often called Mangione "the godfather." Mr. DeSpain was a manufacturers' representative for car wash equipment and had come to Rochester to assist Mangione in purchasing equipment to be installed in a gas station Mangione had purchased. Mangione told DeSpain of the telephone conversation with Kevin. DeSpain, knowing that Kevin and his son John DeSpain were friends, felt that the situation might be serious and that he himself might possibly be the intended victim. He asked Mangione to call Kevin. Mangione called but failed to reach Kevin.

About four days later, after DeSpain had left Rochester, Mangione succeeded in contacting Kevin. Mangione told Kevin that a person named "Jimmy Sunshine" would do the murder and Kevin stated that "my buddy's mother wants her husband, wants to get her husband." Mangione stated that either he or "Jimmy Sunshine" would contact Kevin. Upon telephoning Rock DeSpain, Mangione was told that DeSpain would call the Schaumburg police and notify them of these events.

Officer Terry McGraw of the Schaumburg police department was contacted by DeSpain the following day. On January 23, 1974, after making an investigation, Officer McGraw informed the State's Attorney's office that two teenagers were attempting to hire a killer, and that telephone calls which were made for this purpose emanated from the Senne and Swimley residences.

Investigator Joseph Saladino of the State's Attorney's office attempted to reach Kevin Senne without success. He first called the Senne residence but did not receive an answer. Telephoning the Swimley residence, a male answered

the phone. Saladino asked for Kevin Senne but did not speak with him. Saladino said that he was Jimmy Sunshine and would meet the person's mother at the Woodfield Mall Plaza parking lot near the theatre at 11:00 a.m. the next day.

The next morning, January 24, 1974, Saladino went to his office at 26th and California in Chicago and obtained authorization to use eavesdropping equipment. Saladino was outfitted with a transmitter and tape recorder, both of which were taped to his body under his shirt. He and four others from his office proceeded to Schaumburg to meet with the Schaumburg police.

After this meeting, Saladino proceeded alone in an unmarked vehicle to the Woodfield Mall parking lot, arriving shortly before 11:00 a.m. He parked near the theatre and saw a Sears truck parked approximately 75 yards away. The truck actually belonged to the Schaumburg Police Department and contained video tape equipment.

Within several minutes, Saladino saw a blue-black Lincoln Continental drive into the lot and park nearby. Saladino noted that the license plate number, 147347, was the same that he had been told to watch for. Defendant left the Continental and entered Saladino's car, seating herself on the front passenger's seat. The following conversation occurred:

> "Joseph Saladino: I understand that you want to see me.
>
> Marlene Swimley: Yeah. You're a friend of Tom Mangione's right. Ah, my oldest one talked to Tom, and ah you said something about it could be done over there.

Joseph Saladino: It can be arranged. What is it—exactly do you want, you know, what's, who is it? What's it about?

Marlene Swimley: Well, it's my husband.

Joseph Saladino: And?

Marlene Swimley: What do you mean?

Joseph Saladino: All I got, was I was supposed to contact you. In relation to what? But what is it? You want him what?

Marlene Swimley: You know, kind of evaporated.

Joseph Saladino: What do you mean? What do you mean evaporated?

Marlene Swimley: Well, you know, gone.

Joseph Saladino: Do you mean murder?

Marlene Swimley: Yeah.

Joseph Saladino: You got a picture of him, identification?''

Defendant then handed Saladino two photographs of her husband, who was in the Air Force Reserve on duty in Germany but would be returning February 3. Defendant indicated that she would pay five thousand dollars for the assassination. Saladino asked for a down payment, and defendant stated that she didn't want to give him too much since she had once paid $2,500 to a friend in Detroit to have Mr. Swimley killed and she never again heard from the man who was to accomplish the murder. Defendant agreed to pay $500 and asked if the slaying could be done in Germany. Defendant said Saladino could use the name of a friend of Mr. Swimley who sold paintings and guns, Hans Hagenaw, to lure him off the base, and that she didn't care so long as it was done quickly. Saladino asked why she wanted him killed and defendant replied that her husband was a ''mean bastard.'' Defendant told Saladino that

her husband would soon be worth about $500,000.00. Defendant stated that the only persons who knew of the plan was her son and Kevin.

Defendant wrote Mr. Swimley's address on the back of the photograph of her husband that she had shown and given to Saladino. Defendant gave Saladino two fifty dollar bills and agreed to pay four hundred dollars the following day. Thereupon, defendant was placed under arrest and taken into custody by the Schaumburg police.

After the state had rested its case, defendant testified on her own behalf and denied any involvement in planning her husband's murder. She stated that she first heard of the plan on the evening of January 23, 1974. While preparing dinner, Kevin came into the kitchen and told her that arrangements had been made to murder her husband and that she was to meet a man at Woodfield Mall at 11:00 a.m. the next morning and bring $1,500.00. Defendant, surprised, asked Kevin why he would do this. Kevin replied: ''Well aren't you tired of getting beaten up all of the time.''

Defendant responded that she and her husband would work out their problems alone. Kevin said he couldn't call the arranged meeting off because he didn't know where to call the man. Kevin became upset and stated that he was afraid that the man would do something to him if defendant didn't go. Defendant replied that she would try to think of something.

Defendant went to the Woodfield Mall at the arranged time not thinking anyone would be there to meet her. In case someone did appear, she asserted that she had brought

along a ten year old photograph of her husband, taken of him in his military uniform and with the thought that perhaps a military uniform would be a deterrent to anyone involved in accomplishing her husband's death. Also, defendant testified that she did not believe her husband could be recognized from the old photograph. She asserted that she further discouraged the person she met by not taking any money with her, insisting on several days prior notice of the killing, telling him that she couldn't get the money for a long time, insisting the act be done in Germany, and merely giving him the address of the air base. Defendant further stated that she never intended to kill her husband nor did she know how much money was in her purse when she left for the rendezvous. Defendant stated that she did not believe Saladino was actually a hit man.

Defendant further stated that her maiden name had been Molly Brown but denied receiving a check sent to Molly Brown in care of "Joan Danny." Defendant denied knowing John DeSpain or making airline reservations for Master B. Enderle and Master J. Enderle, or writing a letter requesting a refund, or receiving mail under her maiden name at the home of a friend, Joan Danz. She further denied that several years before, she had pointed a gun at her husband and that it had misfired.

Defendant admitted knowing an old family friend named Hal Blaauw, but denied that he was her boyfriend. Although Blaauw took a trip to Florida with defendant and her children, defendant stated that this was done at her husband's request, as were occasions when Blaauw took defendant out alone.

Defendant denied attempting to obtain a $100,000 insurance policy on her husband's life. She stated that an insurance salesman, Mr. Brazelton, had inquired about insurance. Defendant had responded that she would have to talk to her husband, but gave him information pertaining to her husband and a check for $60.00. The check was returned when Brazelton spoke with Mr. Swimley.

Defendant also stated that she knew Hans Hagenaw and that he had helped her husband purchase oil paintings in Germany.

In rebuttal, a sheriff's policewoman and an assistant state's attorney testified that defendant had stated, after her arrest, that she had attempted to hire someone to kill her husband because he had beaten her.

The first contention to be considered is defendant's claim that authorization to eavesdrop and electronically record the conversation between defendant and Saladino was not properly given by the State's Attorney and thus the recorded conversation was inadmissible in evidence and should have been excluded. Defendant claims that since there was no showing that State's Attorney Carey was outside of the jurisdiction and unavailable, the consent to eavesdrop and record given by First Assistant State's Attorney Haddad was not legally sufficient. This argument is premised upon the assertion that since the eavesdropping statute (Ill. Rev. Stat. 1973, ch. 38, par. 14-2(a)) makes provision only for authorization by the State's Attorney, assistants are precluded from giving proper consents.

Initially, it must be noted that eavesdropping with the consent of one party does not violate the Fourth Amend-

ment to the United States Constitution. (*United States* v. *White* (1971), 401 U.S. 745, 91 S. Ct. 1122, 28 L. Ed. 2d 453.) Thus, the constraints placed on one party consent eavesdropping are statutory. *People* v. *Richardson* (1975), 60 Ill. 2d 189, 328 N.E.2d 260.

In the present case, at the hearing on the motion to suppress, the evidence disclosed that the State's Attorney's office did not have any knowledge of the case until the afternoon of January 23, 1974. A memorandum requesting authority for electronic surveillance was received by assistant state's attorney Gillis the next day at 8:45 a.m. Unable to contact State's Attorney Carey, who was in traffic on the way to a meeting, Gillis obtained the authorization of the first assistant.

In *People* v. *Nahas* (1973), 9 Ill. App. 3d 570, 575-576, 292 N.E.2d 466, 470, a similar issue arose concerning the authorization given by the first assistant state's attorney when the State's Attorney was unavailable. The court stated:

> "An Assistant State's Attorney is generally clothed with all the powers and privileges of the State's Attorney; and all acts done by him in that capacity must be regarded as if done by the State's Attorney himself. 27 C.J.S. District and Pros. Attys. Sec. 30(1).
>
> In *The People* v. *T., St. L. & W. R.R. Co.*, 267 Ill. 142, 107 N.E. 879 our Supreme Court concluded that Assistant State's Attorneys were 'officers for the performance of the general duties of the offices of state's attorney * * *'. We believe that the legislative purpose in creating the office of Assistant State's Attorney (Sec. 18, c. 53, Ill. Rev. Stat.) was to provide an official who should have full power to act in the case of

> the absence or sickness of the State's Attorney, or in the case of his being otherwise engaged in the discharge of the duties of office, in the same manner and to the same extent that the State's Attorney could act, and we also believe that the General Assembly in using the term, 'a State's Attorney' did intend that an assistant could act. Compare (*People* v. *White*, 24 Ill. App. 2d 324, 164 N.E.2d 823, 80 A.L.R.2d 1060.)"

We conclude that the authorization was properly granted. While it has been held that any assistant state's attorney may grant authorization (the second district in *People* v. *Holliman* (1974), 22 Ill. App. 3d 95, 316 N.E.2d 812), because of the facts of this case, we do not need to decide whether the legislature intended to grant such broad authority.

Defendant also claims that the request to eavesdrop and record was based on false information. The request stated that Saladino had spoken to Joe Enderle in arranging the meeting. Saladino later stated that he did not know to whom he had spoken. However, this does not render the information in the request false. Although Saladino did not know, assistant state's attorney Sklarsky, who made the request, testified that Officer McGraw informed him of Enderle's identity. Thus, there was no showing by defendant that the report was false.

It should also be noted that the eavesdropping statute, at the time that the request was made that the conversation be recorded, was silent as to what, if any, information might be required before a State's Attorney may make his request. In *People* v. *Richardson* (1975), 60 Ill. 2d 189, 195, 328 N.E.2d 260, 264, our Supreme Court held that specific standards are not necessary.

"It must be borne in mind, however, that the statute has not diminished the defendant's rights but has in fact increased the protection of his rights. Under the *White* decision, in the absence of the eavesdropping statute, one party consent conversations could be recorded solely upon the decision of the police department. Section 14-2 has added the requirement that there must be, in addition to the consent of one of the parties to a conversation, a request from the State's Attorney before recording of the conversation is permitted. The statute's failure to enumerate requirements in addition to the consent of one party does not violate the fourteenth amendment. The office of the State's Attorney has historically 'involved the exercise of a large measure of discretion in the many areas in which State's Attorneys must act in the performance of their duties in the administration of justice.' (*People* v. *Handley* (1972), 51 Ill. 2d 229, 233, 282 N.E.2d 131, 135.) It does not violate due process to leave with the State's Attorney the decision whether or not to record conversations with the consent of one of the parties to them."

Although the statute has been amended to require judicial approval for the use of an eavesdropping device, (Ill. Rev. Stat. 1976, ch. 38, pars. 14-2, 108A-1,) the State's Attorney enjoyed the privilege of solely determining when to use such a device at the time the conversation in the instant case occurred. *Richardson* was the state of the law at that time and we will not retroactively apply a greater standard.

Defendant further contends that the trial court improperly denied his motion to prevent abuse of the grand jury process. This motion was filed in an attempt by the defense to suppress evidence obtained by virtue of grand

jury subpoenas issued during the course of an investigation of Hal Blaauw. Blaauw was named as a possible co-conspirator in the state's amended bill of particulars.

"In the absence of any showing to the contrary, the presumption will be indulged that the investigation by the grand jury was one that it had the right and power to conduct." (*People* v. *Polk* (1961), 21 Ill. 2d 594, 598, 174 N.E.2d 393, 395.) The representation made by the state to the trial court, that Blaauw may have been a co-conspirator to the offense, was sufficient to establish that the grand jury process was proper. Consequently, any evidence obtained as a result of a bona fide inquiry into the criminal conduct of Blaauw could be used in a pending proceeding such as the present case. See *United States* v. *Sellaro* (8th Cir. 1973), 514 F.2d 114.

Next, defendant contends that it was error for the state to fail to correct the false testimony of John DeSpain. On cross-examination, John DeSpain stated that no one had discussed immunity with him. Defense counsel then stated that he had been informed that immunity may have been discussed. The state's objection to this statement was sustained. Defense counsel then proceeded to other areas of cross-examination. Nothing further pertaining to any discussion of immunity was developed at trial or raised in a rather lengthy and detailed post-trial motion.

While defendant did not specifically raise the question of DeSpain's immunity in his post-trial motion, an allegation did state that the court "erred in repeatedly and unduly restricting the defendant's right to properly and adequately cross-examine and impeach State's witnesses." We

believe that the ordinary rules regarding waiver should be relaxed under the circumstances of this case. See *People* v. *Lott* (1975), 33 Ill. App. 3d 779, 338 N.E.2d 434, affirmed 66 Ill. 2d 290, 362 N.E.2d 312.

Upon consideration of the point on the merits, it must be concluded that defendant failed to present evidence which would establish that DeSpain answered falsely when asked if immunity had been discussed. In *Napue* v. *Illinois* (1959), 360 U.S. 264, 79 S. Ct. 1173, 3 L. Ed. 2d 1217, the Supreme Court held that the failure of the prosecutor to correct the testimony of a witness which was known to be false constituted a denial of due process of law. However, in that case, as in other cases cited by defendant, the false testimony was established in the record. (*People* v. *McKinney* (1964), 31 Ill. 2d 246, 201 N.E.2d 431; *People* v. *Lueck* (1962), 24 Ill. 2d 554, 182 N.E.2d 733.) In the present case, there is nothing in the record to indicate that the testimony was false. Defense counsel's statement that immunity *may* have been discussed is not the kind of evidence which would establish perjury. Defense counsel, if he knew that DeSpain's assertion was false, could have presented competent evidence to establish that point. There was no evidence to substantiate the defendant's speculation that the witness testified falsely when he said that there was no discussion about immunity. Since the defense failed completely to indicate that DeSpain was not telling the truth, there is no showing of any improper conduct by the state. *People* v. *Harris* (1973), 55 Ill. 2d 15, 302 N.E.2d 1.

Defendant raises the contention that it was improper to allow cross-examination of defendant and the admission of

rebuttal testimony on the question of whether defendant had pointed a loaded gun at defendant and pulled the trigger.

During her testimony, defendant stated that she never intended to kill her husband. On cross-examination, she denied that she had pointed a gun at Mr. Swimley and that it had misfired. On rebuttal, Swimley testified that in October, 1972, defendant had pointed a gun at him and pulled the trigger, but the weapon did not fire.

It is apparent that the question of intent was very much in issue in this case. The rule of evidence which precludes the introduction of evidence concerning offenses other than that for which an accused is being tried is fundamental to a fair trial. (*People* v. *Manzella* (1974), 56 Ill. 2d 187, 306 N.E.2d 16.) However, "[e]vidence which tends to prove a fact in issue is admissible even though it discloses that the defendant committed another crime, and evidence which establishes motive, intent, identity, accident or absence of mistake is admissible even though it may also involve proof of a separate offense." (*People* v. *Dewey* (1969), 42 Ill. 2d 148, 157, 246 N.E.2d 232, 236.) The questions asked of defendant in cross-examination and the evidence in rebuttal were proper since it tended to prove defendant's intent. Although the incident occurred in October, 1972, it was not too remote in time. See *People* v. *Griswold* (1950), 405 Ill. 53, 92 N.E.2d 91.

Defendant also contends that the trial court abused its discretion in refusing to exclude Duane Swimley from the courtroom. Further defendant claims that it was error not to allow the defense to call him as a hostile witness.

At the beginning of trial, the court excluded all witnesses except for Swimley. This exception was based upon the representation of the state that he would not be called as a witness during its case-in-chief and that he might not need to be called in rebuttal. Swimley's name was not on the list of witnesses. During the defendant's case-in-chief, defense counsel asked that Swimley be called as a hostile witness or as the court's witness. The reason given by defense counsel for the motion was that:

> "He has been here every day, and they have asked my client whether or not she tried to kill him, whether or not Hal Blaauw was a boyfriend, many questions, your Honor. I wish I could go through each and every one with you to show you that he is definitely a hostile witness. He has come into court every day. He has talked to every witness of the state who has got on the stand. If that isn't a hostile witness, I don't know what it is."

The court rejected the motion and defendant chose not to call Swimley as a witness.

Initially, we note that it is within the discretion of the trial court to permit a witness to remain in the courtroom. (*People* v. *Leemon* (1977), 66 Ill. 2d 170, 361 N.E.2d 573.) Since neither side in the present case indicated that Swimley would be called except in rebuttal, we do not think that there was an abuse of discretion. The state represented that the witness might not be called at all. However, during her testimony, defendant denied that she had pointed or attempted to fire a gun at Swimley. In rebuttal, the state called Swimley. The state's questions to him were directed solely to whether such an incident had indeed occurred. He testified that defendant had attempted

to shoot him with a loaded gun. Under these circumstances it cannot be found that there was an abuse of discretion. See *People* v. *Miller* (1964), 30 Ill. 2d 110, 195 N.E.2d 694; *People* v. *Hill* (1968), 97 Ill. App. 3d 385, 240 N.E.2d 373.

Concerning the court's refusal to allow Swimley to be called as a hostile witness, Supreme Court Rule 238 (Ill. Rev. Stat. 1973, ch. 110A, par. 238) provides:

> "If the court determines that a witness is hostile or unwilling, he may be examined by the party calling him as if under cross-examination. The party calling an occurrence witness, upon the showing that he called the witness in good faith and is surprised by his testimony, may impeach the witness by proof of prior inconsistent statements."

The propriety of utilizing such a procedure rests largely within the discretion of the trial court. (*People* v. *Pittman* (1973), 55 Ill. 2d 39, 302 N.E.2d 7.) Testimony which may be unfavorable to the accused is not per se hostile. *People* v. *Shanklin* (1975), 26 Ill. App. 3d 167, 324 N.E.2d 711.

In the present case, the defense merely asserted that the witness was hostile because he had been in court throughout the proceedings and had spoken with other witnesses. At one point, the trial court suggested that defense counsel call Swimley as a witness to determine if his manner would be evasive or hostile, but this proposal was rejected. In light of this, the trial court did not abuse its discretion. For the same reasons, it was proper to refuse to call Swimley as the court's witness. See *People* v. *Collins* (1963), 25 Ill. 2d 605, 186 N.E.2d 30.

Defendant further contends that it was error for the state to suggest that her motive for wanting her husband

dead was because she had a lover and she also looked forward to a financial gain from the death of her husband. In closing argument, the prosecutor made the statement that Blaauw outranked Swimley in defendant's heart. A review of the testimony discloses that the evidence could support an inference that Blaauw and defendant were more than merely friends, having seen each other socially and having taken a vacation together. The test in such a case is "whether the argument complained of is based upon relevant evidence in the record or legitimate inferences deducible therefrom." (*People* v. *Wright* (1974), 56 Ill. 2d 523, 531, 309 N.E.2d 537, 541.) Under the facts of this case, the argument was not proper.

Furthermore, the testimony indicated that defendant had attempted to procure an insurance policy on her husband's life and had written a check for that purpose. Therefore, the statements made to the jury were supported by evidence in the record. (See *People* v. *Vasquez* (1972), 8 Ill. App. 3d 679, 291 N.E.2d 5.) Similarly, the evidence supported the inference that defendant had once paid a man to kill her husband.

Defendant next contends that a tendered instruction on the subject of entrapment should have been submitted to the jury. At trial, defendant denied that she possessed the intent to solicit Saladino to murder her husband. In view of this denial that she lacked the requisite mental state for the offense charged, the defense of entrapment was incompatible and therefore not available to her. *People* v. *Calcaterra* (1965), 33 Ill. 2d 541, 213 N.E.2d 270, appeal dismissed 385 U.S. 7.

Defendant also contends that it was error not to give defendant's requested jury instructions on accomplice testimony and testimony given in exchange for immunity. Regarding the requested instruction concerning accomplice testimony, defendant submitted an instruction which did not conform to IPI Criminal No. 3.17, Illinois Pattern Jury Instructions, Criminal (1968). While defendant concedes that Supreme Court Rule 451 (Ill. Rev. Stat. 1973, ch. 110A, par. 451) does not require the trial court to give a non-IPI instruction, defendant maintains that the court should have given the correct instruction *sua sponte*. Pertaining to the requested instruction concerning testimony given in exchange for immunity, the trial court refused the instruction. There is no IPI instruction which refers to immunized witnesses.

A party who desires a specific instruction must offer it. The trial court has no obligation to instruct on its own motion. (*People* v. *Nuccio* (1973), 54 Ill. 2d 39, 294 N.E. 2d 276.) This rule has been modified in criminal cases. A court bears the burden of seeing that a jury is instructed on the elements of the crime charged, on the presumption of innocence, and on the question of burden of proof. (*People* v. *French* (1972), 5 Ill. App. 3d 908, 284 N.E.2d 481.) In *People* v. *Parks* (1976), 65 Ill. 2d 132, 138, 357 N.E.2d 487, 489-490, the supreme court dealt with a similar problem. After an examination of the record, the court concluded:

> "In the case at bar, however, viewing the defendant's trial as a whole, it is clear that the jury was not deprived, by the failure to give the accomplice instruction, of essential guidance in its evaluation of the evidence. During the course of his testimony, Hooper ad-

mitted prior inconsistent statements under oath. He was sharply cross-examined both on this point and on the possibility of bias as a result of the charges still pending against him and his plea bargain with the State. Although the jury was not instructed specifically that the credibility of an accomplice was subject to suspicion, it was instructed on its duty to judge the credibility of witnesses generally and on the proper consideration of prior inconsistent statements of a witness. Although these general instructions were not as absolute an admonition as the more particularized accomplice instruction would have been, nonetheless, they provided the jury with sufficient direction. See *United States* v. *Johnson* (7th Cir. 1968), 398 F.2d 29; Annot., *Necessity of, and Prejudicial Effect of Omitting, Cautionary Instructions to Jury as to Accomplice's Testimony Against Defendant in Federal Criminal Trial*, 17 A.L.R. Fed. 249, 315 (1973)."

As in *Parks*, Kevin Senne was cross-examined extensively about prior inconsistent statements and being granted immunity from prosecution. John DeSpain's testimony revealed his agreement to kill Duane Swimley and support payments which were made by the state for his care and expenses while in California. Also, instructions on the credibility of witnesses and on prior inconsistent statements of witnesses were given. After carefully examining the record, we conclude that the failure to give defendant's tendered instructions did not constitute error in this case.

Furthermore, it must be borne in mind that the testimony of these and other witnesses served to explain the circumstances which led to defendant's meeting with Saladino. The central issue in this case was defendant's meaning and intent during this conversation. The meaning was

so clear that the jury, without more, could have based its conviction upon Saladino's testimony and the tape recording and transcript of the conversation that occurred in the shopping center parking lot. Although defendant has raised the contention that the facts were insufficient to prove defendant guilty beyond a reasonable doubt, we must strongly disagree. The only testimony which contradicted the evidence of guilt was that of defendant. Her rendition of what occurred was palpably inconsistent with all of the circumstances proved. It is difficult to conceive that defendant would not intend to have her husband killed while at the same time giving money and information as to his whereabouts to someone representing to be a killer for hire. The transcript of the conversation belies her claim of innocence. The jury was well justified in disbelieving defendant's version and finding that the evidence supports a verdict of guilty.

For the foregoing reasons, the judgment is affirmed.

JUDGMENT AFFIRMED.

DIERINGER and ROMITI, JJ., concur.

APPENDIX B

UNITED STATES OF AMERICA

STATE OF ILLINOIS
SUPREME COURT — ss

AT A TERM OF THE SUPREME COURT, begun and held in Springfield, on Monday, the eighth day of May in the year of our Lord, one thousand nine hundred and seventy-eight, within and for the State of Illinois.

PRESENT: DANIEL P. WARD, CHIEF JUSTICE

JUSTICE ROBERT C. UNDERWOOD	JUSTICE Joseph H. GOLDENHERSH
JUSTICE HOWARD C. RYAN	JUSTICE WILLIAM G. CLARK
JUSTICE THOMAS J. MORAN	JUSTICE THOMAS E. KLUCZYNSKI

WILLIAM J. SCOTT, ATTORNEY GENERAL
LOUIE F. DEAN, MARSHAL
ATTEST: CLELL L. WOODS, CLERK

BE IT REMEMBERED, that, to-wit: on the 26th day of May 1978, the same being one of the days of the term of Court aforesaid, the following proceedings were, by said Court, had and entered of record, to wit:

No. 50519
PEOPLE STATE OF ILLINOIS,

Respondent,

v.

MARLENE SWIMLEY,

Petitioner.

Petition for Leave to Appeal from
Appellate Court First District—63027
74-1463

And now on this day the Court having duly considered the Petition for Leave to Appeal herein and being now fully advised of and concerning the premises, doth overrule the prayer of the petition and denies Leave to Appeal herein.

I, CLELL L. WOODS, Clerk of the Supreme Court of the State of Illinois and keeper of the records, files and Seal thereof, do hereby certify that the foregoing is a true copy of the final order of the said Supreme Court in the above entitled cause of record in my office.

IN WITNESS WHEREOF, I have hereunto subscribed my name and affixed the Seal of said Court this ..... day of ....., 19..

Clerk,

Supreme Court of the State of Illinois.